United States Department of Labor
Board of Alien Labor Certification Appeals
Washington, D.C. 20001

Date: January 30, 1998

Case No. 95 INA 670

In the Matter of:

DR. RICKI STEINBERG MITCHELL,
Employer

on behalf of

HENRYKA STRZESZEWSKA,
Alien

Appearance: P. W. Janaszek of New York, New York, Agent

Before : Huddleston, Lawson, and Neusner
Administrative Law Judges

FREDERICK D. NEUSNER
Administrative Law Judge

DECISION AND ORDER

This case arose from a labor certification application that was filed on behalf of Henryka Strzeszewska (Alien) by Dr. Ricki Steinberg Mitchell (Employer) under § 212(a)(5)(A) of the Immigration and Nationality Act, as amended, 8 U.S.C. § 1182(a) (5)(A) (the Act), and the regulations promulgated thereunder, 20 CFR Part 656. After the Certifying Officer (CO) of the U.S. Department of Labor at New York, New York, denied the applica-tion, the Employer and the Alien requested review pursuant to 20 CFR § 656.26.[1]

Statutory Authority. Under § 212(a)(5) of the Act, an alien seeking to enter the United States for the purpose of performing skilled or unskilled labor may receive a visa if the Secretary of Labor (Secretary) has determined and certified to the Secretary of State and to the Attorney General that (1) there are not sufficient workers who are able, willing, qualified, and available at the time of the application and at the place where the alien is to perform such labor; and (2) the

[1]The following decision is based on the record upon which the CO denied certification and the Employer's request for review, as contained in an Appeal File (AF), and any written argument of the parties. 20 CFR § 656.27(c).

employment of the alien will not adversely affect the wages and working conditions of the U.S. workers similarly employed. Employers desiring to employ an alien on a permanent basis must demonstrate that the requirements of 20 CFR, Part 656 have been met. These requirements include the responsibility of the Employer to recruit U.S. workers at the prevailing wage and under prevailing working conditions through the public employment service and by other reasonable means in order to make a good faith test of U.S. worker availability.[2]

STATEMENT OF THE CASE

This case involves an application (ETA 750A) for the perma-nent employment of the Alien as a Kosher Household Cook with the following duties:

> Prepare, season, and cook soups, meats, vegetables according to Kosher dietary requirements. Bake, broil, and steam meat, fish and other food. Prepare Kosher meats, such as Kreplach, Stuffed Cabbage, Matzo Balls. Decorate dishes according to the nature of the celebration. Purchase foodstuff and account for the expenses involved.

The Employer specified in the ETA 750A that the Alien was to work a basic 40 hour week without overtime being anticipated. The hours were noted to be from 8:00 a.m. to 5:00 p.m. with a rate of pay of $13.64 per hour.[3]

Also accompanying the ETA 750A was the following statement from the Employer:

> Please, be advised that I have an opening for a position of Cook Kosher Live-Out in my household. I have a four year old boy and I am employed full time as a medical doctor. My husband is also employed full time as a medical doctor. Because of our busy and constantly changing work schedule we are not in a position to prepare meals for our child and purchase foodstuffs. At the present time I am doing the cooking but it has become very difficult because of my increasing work load. At the present time I am having an opening for a position of Cook Kosher Live-Out. Hiring a full time cook is absolutely essential for my household. The cleaning is done by members of our household. Because of our religious considerations the meals have to be prepared in our house in accordance with the fundamentals of Kosher food preparation. At the present time we do not employ any U.S. workers in our household.

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[2]Administrative notice is taken of the Dictionary of Occupational Titles, published by the Employment and Training Administration of the U. S. Department of Labor.

[3]The Alien reported in an accompanying statement of her qualifications (ETA 750B) that she was currently in the United States on a B-2 Visa and had worked as a Kosher Cook for a family in the United States for a period of three years.

Notice of Findings. The CO's Notice of Findings (NOF) stated that certification would be denied, subject to rebuttal by the Employer. The reason for denial was, *inter alia*, that the duties described in the ETA 750A did not appear to constitute the full-time work, as required by 20 CFR § 656.3. The CO instructed the Employer to rebut this finding by amending the job duties or by submitting evidence that the job constitutes full time employment and has been customarily required by the Employer. The CO directed the Employer to file the following as evidence in support of the application:

> State the number of meals prepared daily and weekly; the length of time required to prepare each meal; identify the individuals for whom the worker is preparing each meal on a daily and weekly basis; provide a representative one week schedule accounting for eight hours per day/40 hours per week.
>
> If you are claiming you need to employ a cook on a full-time basis because you entertain frequently, you must describe in detail the frequency of household entertaining during the preceding twelve (12) month period. List the dates of entertainment, the nature of the entertainment, guests, the number of meals served, the time and duration of the meal, etc.
>
> Will the worker be required to perform duties other than cooking, i.e., houseworker, child care, home attendant? If yes, list each duty and the frequency of performance.
>
> Evidence employer has employed full-time cooks in the past, i.e., copies of tax and/or social security report forms.
>
> Given the employer's "busy and constantly changing schedule", who will perform the general household maintenance duties, such as cleaning, laundry, vacuuming, etc.?
>
> Any other information and evidence that clearly establishes and demonstrates that this is a permanent, full-time job offer that employer customarily has required.

The CO also required the filing of evidence regarding the care to be provided for any pre-school or school age children in the household while the parents were absent from the home.

Rebuttal. By way of rebuttal to the NOF the Employer replied that she was presently at home caring for her children, a one month old son and 5 year old son, but that she intended to resume her professional career as soon as she has a professional cook in her employment. She stated that the cooking and other duties have been performed by her mother-in-law for the past ten months and that, since it is becoming very difficult for her to do the cooking eight hours per day they have also become dependent on the delivery of ready cooked meals. Employer represented further that the cook will not be required to perform other duties than cooking, as her

mother will be taking care of the children, and she and her husband will perform the cleaning duties.

The Employer offered the following representative daily menu for the household:

> *Breakfast* (8:00-8:30 a.m.) Choice of toasts, oatmeal, cereals, grains, and coffee or tea; *Morning Snacks* (10:45 a.m.) Sand-wiches/turkey, tuna, vegetable, etc. together with side salads and fruit; *Lunch* (11:30 a.m. to 12:00 noon) Homemade soup (chicken, beef, split pea, lentil)/ main course (potted meatballs with potatoes, clops, stuffed peppers)/salads (vegetables and fruit)/dessert; *Afternoon Meal* (3:30 p.m.-3:45 p.m.) Potato or sweet potato pancakes with fruits, potato croquettes, etc.; *Dinner* (4:30 p.m. - 5:00 p.m.) Appetizers, main course (potatoes, rice or dumplings and broiled roasted or baked meat)/ vegetable and fruit salads/ freshly squeezed fruit or vegetable juice/ tea.

The Employer submitted a schedule of the time required to prepare these meals, that also included cleaning the kitchen, washing the dishes, purchasing the food to be prepared, accounting for the expense of such purchases, and packaging the weekend meals.[4] In no instance was the cook to work past 5:00 p.m. The dinners of the Employer and her spouse were to be stored for them on those evenings when the Employer and her spouse would arrive home past that time.

Final Determination. The Employer's application for certification was denied by the CO's Final Determination on the grounds that the Employer had failed to meet the requirements of 20 CFR § 656. After considering the size of the household and the schedule of family members, The CO concluded that it did not appear that the activities described in Employer's rebuttal would require eight hours per day for a total of forty hours per week. The CO said that it "appears rather, that the position of 'Cook' was created solely for the purpose of qualifying the Alien for a visa as a skilled worker, the only household occupation which falls into the skilled worker category."

Appeal. The Employer has requested a review of the denial of her application and the record has been submitted to the Board for such purpose.

DISCUSSION

[4]The rebuttal also included a statement by Employer's mother-in-law that she had been cooking eight hours per day but cannot continue cooking for them anymore. She added that she would be taking care of her grandchildren "as soon as my son and my daughter-in-law have a full-time cook" in their employment. The rebuttal also included copies of invoices for various cooked foods provided by a kosher caterer to the Employer on twenty-four occasions from January to May 1995.

The primary issue on which the CO appears to have decided this application did not include whether or not the Employer's responses to the NOF establish the business necessity of this position, as the CO focused entirely on whether or not a full time position was proven. Consequently, the issue here is whether or not the CO's conclusion that full time employment is not being offered is a reasonable inference from the evidence of record. We think not. The Employer's application for alien employment certification definitively indicated the conditions of employment. 28 U.S.C. § 1746; and see 20 CFR § 656.20(c)(9). The conditions of employment state that forty hours of work are being offered each week at an hourly rate of $12.48, the adequacy of which is unchallenged by the CO.

There is no evidence to the contrary in the Appellate File, and the CO refused to accept Employer's estimate of the time the cook would take to perform the proposed job duties because it is the CO's opinion that time the Employer assumed the work would require was unrealistic and contradictory. The CO concluded that even if the Employer's version of the amount of the time that would be required for each function was accepted, the total would not be equal to an eight hour day. It follows that this dispute comes down to Employer's asserting that preparation of a particular meal takes a certain amount of time, while the CO disagrees and says that it will take less time to prepare the meal in question. In the absence of supporting evidence the CO's finding that the duties described would not constitute forty hours of work is speculative at best. Consequently, we conclude that the evidence of record does not support the CO's finding that the Employer has not offered full time employment.

On the other hand, the NOF did raise an unresolved issue as to the position description requirement two years of specialized cooking experience in the duties of a Kosher cook. The effect of this hiring criterion is to eliminate any U. S. applicant who has two years of cooking experience within the meaning of the DOT position description, but no experience in Kosher cooking. As the CO appears to have confused Employer's proof that this position offers full time employment for a forty hour week with the issue of the business necessity of a restric-tive job requirement, the Final Determination cannot be construed as having determined this issue after weighing the evidence in the record as a whole.

For this reason, this matter will be remanded to the CO with directions to consider whether or not Employer's requirement of two years in cooking Kosher foods is unduly restrictive. 20 CFR § 656.21(b)(2)(i)(B). In the event the CO finds that Employer's requirement of experience in Kosher cooking **in addition to the two years of cooking experience described in the DOT** is unduly restrictive, Employer will then be required to prove that the hiring of a Cook(Household)(Live-Out), specializing in Kosher cooking under DOT No. 305.281-010 arises from business necessity. As the CO did not consider whether Employer's requirement of two years in cooking Kosher food is unduly restrictive under 20 CFR § 656.21(b)(2)(i)(B), as construed herein, the following order will enter.

ORDER

1. The Certifying Officer's decision denying certification under the Act and regulations is hereby vacated set aside.

2. This file is remanded for further proceedings for the reasons hereinabove set forth.

For the Panel:

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FREDERICK D. NEUSNER
Administrative Law Judge

NOTICE OF OPPORTUNITY TO PETITION FOR REVIEW: This Decision and Order will become the final decision of the Secretary of Labor unless within 20 days from the date of service, a party petitions for review by the full Board of Alien Labor Certification Appeals. Such review is not favored, and ordinarily will not be granted except (1) when full Board consideration is necessary to secure or maintain uniformity of its decisions, or (2) when the proceeding involves a question of exceptional importance. Petitions must be filed with:

Chief Docket Clerk
Office of Administrative Law Judges
Board of Alien Labor Certification Appeals
800 K Street, N.W., Suite 400
Washington, D.C. 20001-8002

Copies of the petition must also be served on other parties, and should be accompanied by a written statement setting forth the date and manner of service. The petition shall specify the basis for requesting full Board review with supporting authority, if any, and shall not exceed five, double-spaced, typewritten pages. Responses, if any, shall be filed within 10 days of service of the petition and shall not exceed five, double-spaced, typewritten pages. Upon the granting of the petition the Board may order briefs.